No. 41372-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF
JAMES CURTIS ROWLEY

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION AND ANSWER TO SUPPLEMENTAL BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

James Curtis Rowley is restrained pursuant to the Judgment and Sentence in Mason County Superior Court No. 08-1-00002-8. (Attached to Rowley's Personal Restraint Petition as Appendix A).

B. STATE'S RESTATEMENT OF PETITIONER'S ISSUES PRESENTED FOR REVIEW

1) Washington Constitution Art. 1, § 22 guarantees to all criminal defendants an open and public trial. During voir dire of the jury in the instant case, the trial court judge encouraged jurors to speak privately with the parties in chambers if the juror had sensitive information to share and did not want to speak publicly. *Did the trial court err by holding part of voir dire in chambers, and is Rowley entitled to a new trial because of this error?*

2) In support of his personal restraint petition, Rowley filed a declaration from his trial attorney stating that his trial attorney did not inform him that the private questioning of jurors in chambers violated Rowley's constitutional right to an open and public trial. *Based upon this fact, did Rowley receive ineffective assistance of counsel at trial?*

3) After conviction in the instant case, Rowley timely filed a direct appeal of his conviction. His attorney on direct appeal did not raise the issue that Rowley was denied an open and public trial in this case. *Was Rowley's appellate counsel ineffective for failing to raise the open and public trial issue, and if so, is Rowley entitled to a new trial based upon this error?*

4) After conviction in the instant case, Rowley was sentenced as a persistent offender as defined by RCW 9.94A.561(37)(b).

The trial court found Rowley to be a persistent offender because the current crime of conviction is for child molestation in the first degree, and Rowley has a previous conviction for the same offense. Without submitting the question to the jury, the trial court found that the fact of the prior offense was proved. *Did the trial court err by not submitting the allegation of the prior conviction to the jury as a question of fact to be determined by the jury rather than the trial court?*

C. STATEMENT OF CASE

The Respondent accepts the Petitioner's statement of facts for the purposes of answering the issues raised by this personal restraint petition. RAP 10.3(b), 16.10(d).

D. STANDARD OF REVIEW FOR PERSONAL RESTRAINT PETITION

Rowley asserts constitutional error. To obtain relief through a personal restraint petition, Rowley must show a constitutional error that resulted in actual prejudice. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

E. ARGUMENT

1) Washington Constitution Art. 1, § 22 guarantees to all criminal defendants an open and public trial. During voir dire of the jury in the instant case, the trial court judge encouraged jurors to speak privately with the parties in chambers if the juror had sensitive information to share and did not want to speak publicly. *Did the trial court err by holding part of voir dire in chambers, and is Rowley entitled to a new trial because of this error?*

Rowley's trial counsel was offered the opportunity to object to the in-chambers voir dire of jurors in this case, but counsel expressly assented to the practice he twice answered "no sir" to the court's inquiry as to whether he objected to the practice. (Rowley's Appendix D, at pp. 2, 129). And, the trial court did make reference to Rowley's right to an open and public trial and asked whether any member of the public objected to in-chambers voir dire. (Rowley's Appendix D, at pp. 2, 129).

However, before closure of the courtroom, which includes conducting voir dire in chambers, the trial court judge is required to conduct a complete *Bone-Club*[1] analysis on the record. *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113 (2012). In addition to the steps taken by the court in the instant case, the *Bone-Club* factors also require the trial court to make a showing of a compelling interest in closing the courtroom,

weight the competing interests between closure and an open court, use the least restrictive means available for protecting that interest, consider alternatives to closure, and take no action that is broader than necessary to protect the interest. *Wise* at 1117, citing *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

The trial court is required to consider each of the *Bone-Club* factors on the record prior to closure. *Wise* at 1118. In the instant case, there is no known citation to the record where the trial court openly considered alternatives to closure, weighed the competing interests, or identified the compelling interest the court was seeking to protect. To some extent, the reasoning and recognition of the facts and circumstances behind each of these factors might be assumed, but Wise requires that the factors be considered on the record. *Id.* Additionally, because there were 17 jurors for whom a closed-court voir dire occurred, and because the only on-the-record consideration of closure that occurred was a general consideration, it should not be assumed that closure in regard to each individual juror was the least restrictive means available to protect the interest the court was seeking to protect or that there were not less-restrictive means available in individual cases.

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[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Wise holds that the Washington Constitution at art. I, § 22 guarantees to criminal defendants a right to a public trial. *Wise* at 1116-1117. *Wise* holds that violation of this right is structural error that is not subject to harmless error analysis and for which the remedy is a new trial. *Id.* at 1119- 1120.

The facts of the instant case are unique in that Rowley not only did not object to the closure, he implicitly agreed to the closure by expressing his lack of an objection to the closure when his attorney answered "no sir" to the judge's question asking whether he objected to closure. (Rowley's Appendix D at pp. 2, 129). The Supreme Court has held that "with or without a contemporaneous objection" it is structural error requiring a new trial where a trial court closes voir dire without first conducting a *Bone-Club* analysis on the record. *State v. Paumier*, ___ Wn.2d ___, 288 P.3d 1126, 1130 (2012).

The instant case, however, is more similar to *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), where there was a similar closure of the court during voir dire but the Supreme Court upheld the conviction because the defendant affirmatively assented to closure. But in *Momah* the Court held that even though the court did not explicitly go through the *Bone-Club* factors on the record prior to closure, the *Momah* court record

was sufficient for the Court to find that the trial court "effectively" went through the required *Bone-Club* factors. *Paumier* at 1129-30, quoting *Wise*. In the instant case, no citations to the record was located where it can be argued that the trial court "effectively" weighed each of the *Bone-Club* factors on the record prior to closure.

State v. Paumier, ___ Wn.2d ___, 288 P.3d 1126, 1130 (2012), and *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113 (2012), each hold that on direct appeal a violation of the right to an open trial is structural error for which prejudice is presumed, that the defendant has no burden to show prejudice on review, and that the remedy for this error is a new trial. However, our Supreme Court has not decided "whether a public trial violation is also presumed prejudicial on collateral review." *In re Morris*, ___ Wn.2d ___, 288 P.3d 1140, 1144 (2012).

Initially it would appear that the State has no option but to concede error due to an open-court violation and to concede that the remedy is a new trial. However, it is not clear that this result is mandated in the context of a personal restraint petition.

2) In support of his personal restraint petition, Rowley filed a

> declaration from his trial attorney stating that his trial attorney did not inform him that the private questioning of jurors in chambers violated Rowley's constitutional right to an open and public trial. *Based upon this fact, did Rowley receive ineffective assistance of counsel at trial?*

The waiver of a constitutional right not does not, per se, require the court to conduct a colloquy with the defendant before excepting the waiver. See, e.g., *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996); *State v. Stegall,* 124 Wn.2d 719, 881 P.2d 979 (1994); *State v. Humphries*, 170, Wn. App. 777, 793, 285 P.3d 917 (2012). However, defense counsel has a duty to discuss defendant's rights with him and consult with him regarding the waiver of a constitutional right. *Humphries* at 793-94.

In the instant case, Rowley's attorney did not inform him that the in-chambers voir dire of jurors violated his right to an open and public trial. (Petitioner's Appendix B). Rowley asserts that had he been informed of this right, he would not have waived this right. (Petitioner's Appendix C). The State has no tangible evidence to rebut Rowley's assertion of what his position would have been under other circumstances.

Ineffective assistance of counsel is a two-pronged test that requires

the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Defense counsel was deficient for failing to advise Rowley that the in-chambers voir dire violated his open trial rights, and the Supreme Court has recently reaffirmed that open court violations are per se prejudicial. *In re Morris*, ___ Wn.2d ___, 288 P.3d 1140, 1145 (2012). However, here Rowley asserts error by his trial counsel rather than his appellate counsel, and to prevail on a personal restraint petition, Rowley must show that his attorney's deficient performance resulted in actual prejudice. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

The State respectfully argues that Rowley did not suffer actual prejudice due to his attorney's performance and that, to the contrary, Rowley has benefited from his attorney's error. The reasoning behind this assertion is that had Rowley objected to the in-chambers voir dire of seventeen jurors in this case, he would have lost the benefit of the in-chambers voir dire (assuming that the court's response to the objection

would have been to have held voir dire in open court rather than conduct a Bone-Club analysis on the record).

The in-chambers voir dire resulted in the discovery of information that caused eleven of the seventeen jurors to be stricken for cause because they could not provide Rowley with a fair trial. (Petitioner's Appendix D). Rowley benefited from this discovery because it resulted in the removal of jurors who could not provide him with a fair trial.

If in these circumstances the jury would have acquitted Rowley, the issue would be moot. However, if his attorney would not have erred and these for-cause strikes, therefore, had not occurred, and if the jury convicted Rowley, then he would have no open-trial error upon which to obtain a new trial. But if the jury convicted, as it did in this case, then regardless whether his attorney was ineffective, Rowley would get a second chance with a new jury because of the error. See, e.g., *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113 (2012); *State v. Paumier*, ___ Wn.2d ___, 288 P.3d 1126 (2012). Thus, under these circumstances Rowley has obtained an advantage that is unavailable to most defendants; Rowley has two chances at acquittal.

Although Rowley may be entitled to a new trial due to a violation of his open trial rights and because his appellate attorney did not raise this

issue (as discussed elsewhere in the State's response), the State asserts that because Rowley did not suffer actual prejudice from his trial attorney's error, Rowley's allegation that his trial counsel was ineffective is not an additional reason that Rowley is entitled to a new trial.

3) After conviction in the instant case, Rowley timely filed a direct appeal of his conviction. His attorney on direct appeal did not raise the issue that Rowley was denied an open and public trial in this case. *Was Rowley's appellate counsel ineffective for failing to raise the open and public trial issue, and if so, is Rowley entitled to a new trial based upon this error?*

The issue here is substantially similar to the issue decided in the case of *In re Morris*, ___ Wn.2d ___, 288 P.3d 1140 (2012). However, a potentially important distinction is that in the instant case Rowley, through his attorney, expressly voiced that he had no objection to closure of the voir dire, whereas in *Morris* the defendant did not object to closure, but there is no indication that Morris expressly voiced a lack of objection (which could be inferred to be an express assent). Additionally, in *Morris* the record did not show that any of the *Bone-Club* factors were

considered, whereas in the instant case at least some of the *Bone-Club* factors were considered. (Rowley's Appendix D at pp. 2, 129).

In *Morris*, the defendant clearly would have prevailed had his appellant attorney raised an open-court violation on direct appeal. This result was certain because our Supreme Court has stated that the absence of an objection is not a waiver of the public trial right. *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113 (2012); *State v. Paumier*, ___ Wn.2d ___, 288 P.3d 1126 (2012).

On direct appeal (as opposed to trial), the defendant in *Morris* had nothing to risk and no advantage to forfeit by raising the open-trial issue. Appellate counsel was, therefore, ineffective in *Morris* by not raising the open-trial issue (because on the facts of that case the defendant certainly would have obtained a new trial had the issue been raised on direct appeal). *Morris* at 1145. But the facts of the instant case are somewhat distinct from the facts of *Morris*, in that in the instant case Rowley effectively assented to closure of the voir dire when he expressly stated that he had no objection to the closure, and because in the instant case the trial court did discuss some of the *Bone-Club* factors on the record. (Rowley's Appendix D at pp. 2, 129).

Still, the State must concede that *Morris* would seem to be on point with the instant case and would seem to require that Rowley obtain a new trial due to ineffective assistance by his appellate attorney for not raising the open-trial issue. As in *Morris*, Rowley had no advantage to forfeit and would have incurred no risk by raising the open-trial issue on direct appeal. The State's concession is qualified, however, because it is not clear that on the facts of the instant case Rowley certainly would have obtained a new trial had he raised the open-trial issue on direct appeal. Because Rowley expressly affirmed, through his counsel, that he did not object to the closure, and because he benefited from the closure, and because the trial court judge voiced the reason for the closure and invited objections from the parties and the public, this case is distinct.

4) After conviction in the instant case, Rowley was sentenced as a persistent offender as defined by RCW 9.94A.561(37)(b). The trial court found Rowley to be a persistent offender because the current crime of conviction is for child molestation in the first degree, and Rowley has a previous conviction for the same offense. Without submitting the question to the jury, the trial court found that the fact of the prior offense was proved. *Did the trial court err by not submitting the allegation of the prior conviction to the jury as a question of fact*

to be determined by the jury rather than the trial court?

Rowley asserts that the question of whether he has a predicate prior conviction to be sentenced as a persistent offender under RCW 9.94A.561(37)(b) and RCW 9.94A.570 should be submitted to the jury rather than be decided by the trial judge. He asserts this error only to preserve the issue in case these statutes or this practice is later ruled to be unconstitutional. Petitioner's "Personal Restraint Petition" at 21.

The constitutionality of allowing the judge, rather than a jury, to answer this question has been recently examined and affirmed. *State v. Reyes-Brooks*, 165 Wn. App. 193, 267 P.3d 465 (2011) (remanded on other grounds at 175 Wn.2d 1020, 289 P.3d 625 (2012)).

F. CONCLUSION

Closure of voir dire was improper in this case because the trial court did not go through each of the Bone-Club factors prior to closure and because it is not clear that closure was necessary or that lesser alternatives were not available.

However, the facts of the instant case are somewhat factually distinct from recent opinions of the Supreme Court because in the instant

case the defendant expressly stated that he did not object to closure, he benefited from the closure, and the court made some attempt to go through the *Bone-Club* factors (without expressly naming *Bone-Club*).

Because this case is on collateral review rather than a direct appeal, it is not clear that Rowley is entitled to a new trial on the unique facts of this case.

DATED: January 16, 2013.

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